(8)

Supreme Court, U.S.
FILED
OCT 20 1998
CLERK

No. 98-564

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

V.

MATTHEW GLAVIN, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE *AMICUS CURIÆ* DISTRICT OF COLUMBIA STATE DEMOCRATIC COMMITTEE IN SUPPORT OF THE APPELLANTS

Donald Dinan
O'Connor & Hannan
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-1400
Counsel for the Amicus Curiæ
The District of Columbia State
Democratic Committee

39 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF POINTS AND AUTHORITIES iii

CONSTITUTIONAL PROVISIONS iii

STATUTORY PROVISIONS iii

CASES iv

DICTIONARIES v

DOCUMENTARY SOURCES v, vi, vii

OTHER SOURCES vii, viii

STATEMENT OF INTEREST OF THE AMICUS CURIÆ 1

SUMMARY OF ARGUMENT 1

I. INTRODUCTION. 2

II. THE PLAIN MEANING OF THE WORDS "ACTUAL ENUMERATION DOES NOT COMPEL A PARTICULAR METHODOLOGY FOR TAKING THE CENSUS. 5

III. THE HISTORY OF THE CENSUS CLAUSE DOES NOT COMPEL A PARTICULAR METHODOLOGY IN CONDUCTING THE CENSUS. 12

IV. THE EARLY IMPLEMENTATION OF THE CENSUS DOES NOT DEMONSTRATE A A CONSTITUTIONAL TRADITION REQUIRING DIRECT CENSUS BUREAU CONTACT. 22

V. CONCLUSION. 30

TABLE OF POINTS AND AUTHORITIES

CONSTITUTIONAL PROVISIONS:

Article I, Section 2, Clause 3 (Census Clause) *passim*

Article I, Section 8, Clause 18 (Necessary and Proper Clause) 4,5

Article I, Section 9, Clause 3 (Capitation Clause) 5

Articles of Confederation, Article IX 13

STATUTORY PROVISIONS:

Act of March 1, 1790, Ch. 2, 1 Stat. 101 (1790) 23, 25

Act of February 28, 1800, Ch. 12, 2 Stat.11 (1800) 25

Act of March 26, 1810, Ch. 17, 2 Stat. 564 (1810) 23, 25

Act of March 13, 1820, Ch. 23, 3 Stat. 548 (1820) 25

Act of March 23, 1830, Ch. 40, 4 Stat. 383 (1830) 25

Act of March 3, 1839, Ch. 80, 5 Stat. 331 (1839) 25

Act of May 23, 1850, Ch. 11, 9 Stat. 428 (1850) 23, 25, 26

Act of March 3, 1879, ch. 195, 20 Stat. 473 (1879) 26, 27

Act of April 20, 1880, ch. 57, 21 Stat. 75 (1880) 27

CASES:

Austin v. United States, 509 U.S. 602 (1993) 8, 10

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,
492 U.S. 257(1989) (Brennan, J., concurring in part, dissenting in part) 6

County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter,
492 U.S. 573 (1989) (Stevens, J., concurring in part, dissenting in part) 6

Farmer v. Brennan, 511 U.S. 825 (1994) (Thomas, J., concurring) 8

Grady v. Corbin, 495 U.S. 508 (1990) (Scalia, J., dissenting) 9, 10

Helling v. McKinney, 509 U.S. 25 (1993) (Thomas, J., dissenting) 10

Nixon v. United States, 506 U.S. 224 (1993) 6, 22

Powell v. McCormack, 395 U.S. 486 (1969) 22

United States v. Lopez, 514 U.S. 549 (1995) (Thomas, J., concurring) 6

United States Department of Commerce, et al. v. United States House of Representatives, et al., jurisdiction noted, 67 U.S.L.W. 3169 (U.S. Sept. 10, 1998) (No. 98-404) 2

Wisconsin v. City of New York, 517 U.S. 1 (1996) 22, 30

DICTIONARIES:

THOMAS SHERIDAN,
A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE
(London, 1780) 8, 9, 10, 11, 12

THOMAS SHERIDAN,
A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE
(Philadelphia, 6th ed. 1796) 6, 7, 8, 11, 12

JOHN WALKER,
A CRITICAL PRONOUNCING DICTIONARY AND EXPOSITOR OF THE ENGLISH LANGUAGE
(London, 1791) 10, 11, 12

DOCUMENTARY SOURCES:

2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot, ed., 2nd ed., 1907) 20

4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot, ed. 2nd ed., 1907) 14, 15

9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES (Kenneth R. Bowling & Helen E. Veit, eds., 1988) 15

12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES, 1789-1791, DEBATES IN THE HOUSE OF REPRESENTATIVES,

SECOND SESSION: JANUARY-MARCH 1790,
(Helen E. Veit, et al., eds., 1994) 20

14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES, 1789-1791, DEBATES IN THE HOUSE OF REPRESENTATIVES, THIRD SESSION: DECEMBER 1790-MARCH 1791,
(William DiGiacomantonio, et al., eds., 1995) 3

1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776-1787
(Merrill Jensen, ed., 1976) 13, 14, 19, 20

2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, PENNSYLVANIA
(Merrill Jensen, ed., 1976) 6

9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VIRGINIA [2] (John P. Kaminski & Gaspare J. Saladino, eds., 1990) 6, 15

10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VIRGINIA [3]
(John P. Kaminski & Gaspare J. Saladino, eds., 1993) 3

16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE [4] (John P. Kaminski & Gaspare J. Saladino, eds., 1986) 15

18 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE (John P. Kaminski & Gaspare J. Saladino, eds., 1995) 14, 15

24 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789
(Gaillard Hunt, ed., 1922) 14

13 PAPERS OF JAMES MADISON (Charles Hobson & Robert Rutland, eds., 1981) 28

22 PAPERS OF THOMAS JEFFERSON
(Charles Cullen, ed., 1986) 28

1 RECORDS OF THE FEDERAL CONVENTION OF 1787
(Max Farrand, ed., 1937) 14, 15, 16, 17, 18, 19

2 RECORDS OF THE FEDERAL CONVENTION OF 1789
(Max Farrand, ed., 1937) 15, 20

3 RECORDS OF THE FEDERAL CONVENTION OF 1787
(Max Farrand, ed., 1937) 28

31 THE WRITINGS OF GEORGE WASHINGTON
(John C. Fitzpatrick, ed., 1931) 28

OTHER SOURCES:

MARGO ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 173-75 (1988) 24, 29

DANIEL BOORSTIN, THE AMERICANS, THE DEMOCRATIC EXPERIENCE 167 (1973) 29

4 BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE AND LABOR, HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790 (1908) 24

7 BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE AND LABOR, HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790 (1908) 23, 24

9 BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE AND LABOR, HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790 (1908) 24

THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE UNITED STATES SENATE (1801), *reprinted as* S. Doc. No. 103-8 (1993) 4

THOMAS JEFFERSON, RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES, *reprinted in* 9 NATIONAL STATE PAPERS OF THE UNITED STATES, 1789-1817 (Eileen Carzo, ed.) 24

STATEMENT OF INTEREST OF THE *AMICUS CURIÆ*

The District of Columbia State Democratic Committee represents the Democratic Party and its thousands of electors in the Nation's Capital. As such, the *Amicus Curiæ* has an important interest in making sure that all electors in the District of Columbia receive their equal rights, proper representation, and proper allocation of Federal programs. This case implicates all of these fundamental concerns of the *Amicus Curiæ*. The vital importance of these issues to the District of Columbia State Democratic Committee led it to participate as *Amicus Curiæ* before the three-judge panel of the United States District Court for the District of Columbia in the companion case to this cause, *United Sates Department of Commerce, et al. v. United States House of Representatives, et al., jurisdiction noted*, 67 U.S.L.W. 3169 (U.S. Sept. 10, 1998) (No. 98-404). As with its memorandum to the District Court, this brief is limited to certain historical and linguistic matters concerning the constitution and the census. Although the courts below did not reach the constitutional issues, the Solicitor General raised the matter in both of his Jurisdictional Statements. As soon as the *Amicus Curiæ* learned of this situation, it prepared this brief. Its goal is to provide this Honorable Court with more complete information than the parties could devote to the matter in their briefs.

SUMMARY OF ARGUMENT

In this case, the Appellees apparently claim that the words "actual enumeration" in the Census Clause of the United States Constitution requires a "headcount" to the exclusion of all other methods, including the statistical estimation technique suggested by the Census Bureau. Such a reading is inconsistent with the provisions of the Constitution and makes the last phrase of the Census Clause meaningless. In addition, it is clear from an examination of

contemporary dictionaries and the words of the Founders themselves that the terms "enumeration" and a "census" were two words for identical concepts. Those concepts do not exclude any particular census methodology that complies with the basic rationales of the Census Clause. In addition, non "headcount" techniques such as estimations are within the meaning of the words the Framers chose.

The history of the Census Clause in the Federal Convention demonstrates that the Framers did not incorporate a precise census methodology, but wanted the most accurate number obtainable given the technology and techniques of the time. That intent was carried through during the history of the early censuses. The early censuses attempted many different methods to count those people who could not be contacted. This is the same goal that the Census Bureau has for its plan for the 2000 census. Thus, not only is the "headcount" method not the only permissible system, but the Census Bureau's statistical estimation proposal falls squarely within the country's constitutional traditions.

I. INTRODUCTION

There is no question that the decennial census is among the most important functions performed by the Federal Government. It serves as the basis for the apportionment of representatives in the United States Congress. But its constitutional significance goes further. Both the Congress and the President make extensive use of census data in exercising their powers under the United States Constitution. [1] The same is true for the States under their constitutions and

---

[1] This is the view extending from the beginning of the Republic. *See, e.g.*, remarks of Hugh Williamson (who was a delegate to the Fedeal (continued...)

the localities under their charters. Thus, the census in all its uses, not just Congressional apportionment, plays an important role in the constitutional scheme. As James Madison explained to the Virginia ratifying convention, "The census in the Constitution was intended to introduce equality in the burdens to be laid on the community." 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VIRGINIA [3] 1343 (John P. Kaminski & Gaspare J. Saladino, eds., 1993).

The core constitutional question presented in this litigation is whether the Census Clause of the Constitution, Article I, Section 2, Clause 3, either prescribes or proscribes any particular methodology in determining the number of inhabitants in the United States so long as its fundamental purposes are met. This examination must take place in the context of the particular proposal under consideration. In sum, it appears that the Census Bureau will attempt to contact every person through either a mailing or an enumerator. When, as all parties agree is inevitable, not all Americans respond to these entreaties, the Bureau intends to determine the amount and distribution of non-answerers through statistical sampling and estimation techniques. It will then aggregate the number of answerers and non-answerers to arrive at the final census count. The Appellees apparently believe that this action is inconsistent with the language of an "actual enumeration" in the Census Clause. However, neither the language nor the history of the Clause (nor its early

---

[1] (...continued)
Convention) in the First Congress stating that Congress could not exercise its authority regarding the militia in the absence of census information. 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, DEBATES IN THE HOUSE OF REPRESENTATIVES, THIRD SESSION: DECEMBER 1790-MARCH 1791, 189 (William DiGiacomantonio, et al., eds., 1995).

implementation) supports such a conclusion.

A construction and history of the Census Clause that requires one specific way of conducting the census seems to be at odds with the Constitution itself. For example, the Framers were far from disapproving the use of estimates in important government decisions. In fact, the Constitution explicitly endorses and employs estimations for Congressional action. When voting on any method before them, a specific tally of members' votes is taken only if twenty percent of those present request it. U.S. CONST. art. I, § 5, cl. 3. Absent such a request, measures are passed or defeated by voice vote, which is nothing but an aural estimation by the Chair as to which side has more votes.[2/] This procedure has been employed since the beginning of the Congress under the Constitution. Clearly, the Founders were not allergic to estimations for constitutional purposes.

More importantly, if a census methodology is "locked in," a part of the Census Clause become superfluous. The Clause commands that the Census be taken "in such Manner as they shall by Law direct." U.S. CONST art. I, § 2, cl. 3. This phrase can only mean one of two things. First, it could mean that the Federal Government has the discretion to prescribe any of various ways for obtaining the number and distribution of people in the United States. Second it could mean that the Congress is simply given the authority to determine how many enumerators it will hire, how much it will pay them, and other administrative matters. However, this latter construction is highly implausible because such

---

[2/]This system was established at the very beginning of the Republic. *See* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE UNITED STATES SENATE, §41.1 (1801), *reprinted as* S. Doc. No. 103-8, at 73 (1993).

authority is already granted in the Necessary and Proper Clause. U.S. Const art. I, § 8, cl. 18. Thus, the only meaning of the last phrase of the Census Clause that makes sense is that the Constitution did not freeze a census methodology and left it to future generations of the Government to determine the best way to get the best numbers.

II. THE PLAIN MEANING OF THE WORDS "ACTUAL ENUMERATION" DOES NOT COMPEL A PARTICULAR METHODOLOGY FOR TAKING THE CENSUS.

The examination of the Census Clause begins with the words of the Constitution. The clause reads, in relevant part, that, "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." In the Capitation Clause, the Constitution expressly equates the words "actual Enumeration" with a "Census." U.S. CONST art. I, § 9, cl.3. Thus, it is clear from the text of the Constitution that the words "actual enumeration" had no special significance, and meant the same thing as a "census." Despite the fact that the Framers, almost uniquely in the Constitution, self-defined a particular term, the Appellees apparently believe that the choice of the words "actual enumeration" compels what they term a "headcount, " i.e., a list of every individual in the United States that is generated solely by a direct Census Bureau contact, and prohibits any other method of finally determining the number of inhabitants of the United States. The words "actual enumeration," however *do not* constrain the Government's census methodology.

This Court and its members have turned to a number of Eighteenth Century dictionaries to determine whether the

contemporary meanings of particular words in the Constitution lead to a definitive construction of a particular clause. Examining the three Eighteenth Century dictionaries this Court uses most frequently demonstrates that, so long as its basic purposes are met, the words the Framers chose for the Census Clause neither requires nor prohibits any particular manner of determining population.

One dictionary this Court and its members often consult is THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia, 6th ed. 1796).[3] *Nixon v. United States*, 506 U.S. 224, 229 (1993); *United States v. Lopez*, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 647 (1989) (Stevens, J., concurring in part, dissenting in part); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 295 (1989) (Brennan, J., concurring in part, dissenting in part). That dictionary, like all the Eighteenth Century dictionaries surveyed for this Memorandum, does not define the word "census." However, both the friends and the opponents of the new Constitution understood that a "census" was the same thing as an "enumeration."[4] Sheridan defines

---

[3] All the Eighteenth Century dictionaries referred to herein are arranged alphabetically and are unpaginated.

[4] *See, e.g.*, 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, PENNSYLVANIA 536 (Merrill Jensen, ed., 1976) (Remarks of Thomas McKean, Chief Justice of the Pennsylvania Supreme Court, before the Pennsylvania Ratifying Convention in favor of the Constitution equating an enumeration and a census); 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VIRGINIA [2] 821 (John P. Kaminski & Gaspare J. Saladino, eds., 1990) (9 DHRC) (Letter of George Mason to John Lamb, June 9, 1788, enclosing Virginia Anti-Federalist
(continued...)

"Enumeration." The definition, in full, is, "The act of numbering or counting over."[5] Neither the words "act" nor "over are relevant to resolving the question presented in this case. However, the words "numbering" and "counting" offer considerable guidance.

Of course, the mere words "numbering" or "counting" do not, in themselves, tell how the "numbering" or "counting" may be done. On could count in base eight, for example. Further lexicographic examination sheds light on this matter. The definition of the verb "To number" is, "To reckon how many; to reckon as one of the same kind." The definition of the verb "To count" is, "To number, to tell; to reckon; to

---

[4] (...continued)
constitutional amendments equating a census and an enumeration).

[5] Curiously, given their reliance on the precise words of the Constitution, the Appellees in the court below relied more on the verb, "To enumerate" rather than for the actual word of the Constitution, "enumeration." Happily, this Court need not referee this matter. To the extent there is any definitional difference, the most precise explanation of the idea *must* lie where the definitions coincide. This edition of Sheridan's DICTIONARY defines, "To Enumerate" in full as, "To reckon up singly; to count over distinctly." "Reckon" and "count," both of which are discussed in the main text, form the basis of this definition as it does for the ultimate meaning of "enumeration." Thus, "To Reckon" and "To Count" as the core meaning of both "To enumerate" and "enumeration," are the relevant terms for examination. Further, the odd words out in the definition of the verb "To enumerate" do not significantly change the meaning of the concept. "Distinctly" is defined in full as, "Not confusedly; plainly; clearly." No one claims that the Bureau's plan is not done "distinctly" in this sense. Similarly, "Singly" means, "Individually; particularly. " The definition for "Particularly" is, "Distinctly; singly; not universally; an extraordinary degree." Therefore, this definition seems to indicate that, "to enumerate" is a reckoning that is, "not universal[]," and thus does not necessarily require a listing of every individual member of a particular class.

account; to impute to; to charge to." It is clear that the common term, "To reckon," is key in determining the numbering or counting of an enumeration. "To reckon" is, "To compute; to calculate. . . ."[6/] Thus, we can see that an enumeration can encompass mathematical action to arrive at a count, because a "calculation" is, "A practice or manner of reckoning; the result of mathematical operation"and, "To calculate" is, "To compute; to reckon; to project for any certain end."[7/] It is clear that "reckoning," the heart of the meaning of "enumeration," and estimation (as the Census Bureau proposes) are related activities. This is clear because the full definition of an "Estimate" closely tracks the "To reckon" definition as a, "Computation; calculation; valuation; opinion; judgment."[8/] Thus, when examined in detail, it is clear that the concept of "enumeration" was not a static concept that defined a particular manner of counting. It most certainly did not exclude an estimate.

This Court and its members frequently consult another Sheridan work: THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (London, 1780). *See, e.g.*, *Austin v. United States*, 509 U.S. 602, 614 n. 7 (1993); *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., concurring);

[6/]The definition in full is, "To compute; to calculate; to state an account; to pay a penalty; to lay a stress or dependence upon. A second definition is, "To number; to esteem; to account."

[7/]The definition in full of "To compute" is, "To reckon; to calculate; to count."

[8/]The "To estimate" definition is, "To rate; to adjust the value of, to judge any thing by its proportion to something else; to calculate; to compute."

The "Estimation" definition is, "The act of adjusting proportioned value; calculation; computation; opinion; judgment; esteem; regard; honor."

Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting). Not surprisingly, this dictionary provides a similar analysis. The definition of "Enumeration," in full, is, "The act of numbering or counting over." Again, neither the words "numbering" nor "counting" in themselves limit how the numbering or counting may be done. As before, the definitions of the verb forms of "number" and "count" demonstrate the mathematical nature encompassed in "counting" and "numbering." "To number" means, "To count, to tell, to reckon how many. . .."[9/] "To count" means, "To number, to tell; to reckon. . ."[10/] The common threads in these definitions are "to tell" and "to reckon." As before, "To tell," that has the same definition quoted above and that provides little useful information for the purposes of this case. The latter definition, "to reckon," is far more helpful. "To reckon" is, "To compute, to calculate. . ."[11/] Once more, both "compute" and "calculate" imply more than a simple list and include mathematical activity beyond a simple listing. The dictionary definitions confirm this. The full, somewhat circular, definition of "Compute" is, "To reckon, to calculate, to count." The mathematical action is more clearly set out in

---

[9/]The full definition "To number" is, "To count, to tell, to reckon how many; to reckon as one of the same kind.

[10/]There are two definitions listed for the verbal form of "To count." Their full definitions are first, "To number, to tell; to reckon, to account, to consider as having a certain character; to impute to, to charge to," and second, "To lay a scheme; to depend on."

[11/]There are two definitions listed for the verbal form of "To reckon." Their full definitions are first, "To number, to count; to esteem, to account." and second, "To compute, to calculate; to state an account; to pay a penalty; to lay stress or dependence upon."

The full definition of "Reckoning" is, "Computation, calculation; accounts of debtor and creditor; money charged by host; account taken; esteem, account, estimation."

"Calculate" which is fully defined as, "To compute, to reckon; to adjust to project for any certain end." Clearly then, an enumeration is a counting or numbering which is a reckoning. The definition of reckoning, leads to a computation or calculation, which is an adjustment or projection for a certain end. As before, then, the definitions in use at the time of the Founding do not provide a methodological limitation on the census. Indeed, they seem to encompass the Census Bureau's proposed estimation. This is clear because the core of "enumeration, a reckoning, can involve calculation and computation. An "Estimation," which is "the act of adjusting proportioned value; calculation, opinion; judgment; esteem; regard; honor, "falls squarely into the concepts available to the Founding Fathers.

Finally, a similar analysis may be made with yet another Eighteenth Century dictionary used by members of this Court, JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY AND EXPOSITOR OF THE ENGLISH LANGUAGE (London, 1791). *See, e.g., Austin, supra*, 509 U.S. at 614, n.7; *Helling v. McKinney*, 509 U.S. 25, 37 (1993) (Thomas, J., dissenting); *Grady, supra*, 495 U.S. at 529 (Scalia, J., dissenting). As with the Sheridan dictionary, the full definition of "Enumeration" is, "The act of numbering or counting over." "To Number" is defined in its entirety as, "To count, to tell, to reckon how many; to reckon as one of the same kind." "To Count" means, "To number, to tell; to reckon, to account. . ."[12] Again, the common terms are "to tell" and "to reckon." The definition of "To reckon" states

[12]There are two verbal definitions of "to count." The first is, "to number, to tell; to reckon; to account; to consider as having a certain character; to impute to, to charge to." The other definitions "to lay a scheme; to depend on."

that it is, "To compute, to calculate. . . ." [13] The full definition of "Compute," once more, is "To reckon, to calculate, to count." Similarly, the full definition of "To calculate" is, " To compute, to reckon; to adjust, to project for any certain end," and the full definition of "Calculation" is, "A practice or manner of reckoning; the art of numbering; the result of arithmetical operation." Again, mathematical action is seen in these definitions. This is made even more clear by the definition of "To account" (part of the definition of "To count") which is, "The state or result of a computation; value or estimation. . .."[14] Thus, Estimation was expressly within the meaning of counting at the time of the Founders. At the least, it seems clear that no one technique that complies with the basic requirements of the Census Clause can be excluded by the words of the Constitution.

The Appellees also rely upon the word "actual" before "enumeration" in the Census Clause in an attempt to provide a textual limitation on census methodology and an exclusion of estimation techniques. A similar lexicographic analysis demonstrates that this contention is likewise meritless. All three dictionaries examined above employ identical definitions of this word. Their entire definition of "Actual"

[13]There are two verbal definitions of "To reckon." The first, in full, is, "To number, to count; to esteem, to account. The second, in full, is, "To compute, to calculate; to state an account; to pay a penalty; to lay stress or dependence upon."

The word "Reckoning" is defined in full as, "Computatiou [sic.], calculation; accounts of debtor & creditor; money charged by a host; account taken; esteem, account, estimation."

[14]The full definition of "Account" is, "A computation of debts or expenses; the state or result of a computation; value or estimation; a narrative, relation; the relation & reasons of a transaction given to a person in authority; explanation; assignment of causes."

is "Really in act, not merely potential; in act, not purely in speculation." As described, the Bureau's proposed methodology, relying on a combination of lists of persons contacted and well-established statistical analysis of data, does not appear to be either "merely potential" or "purely in speculation" by any reasonable meaning of those terms. Thus, the Eighteenth Century definition of the word "actual" does not prohibit the Census Bureau's 2000 census plans.

In sum, at the time of the Founding, the definitions and concepts of "actual" and "enumeration," do not appear to have fixed meanings of only a simple recitation or a simple list of elements in a set made by direct contact. Rather, their meanings are much less specific. "Actual" only meant something not wholly speculative, which a properly grounded statistical estimate is not. Similarly, while an "enumeration" could mean a simple list, it could also encompass mathematical activity including, and explicitly, by the meanings of the day, an estimation. At the very least, so long as it complies with the basic census rationale, it does not exclude or require a particular methodology. Simply put, the ordinary meaning of the words of the Constitution during the Framers' era does not either prescribe or proscribe a particular methodology (including estimates) in determining the number of persons in an enumeration. Accordingly, a linguistic claim that an "actual enumeration," as that term would have been reasonably understood by the Founding generation, necessary excludes the type of estimation proposed by the Census Bureau is simply incorrect.

III. THE HISTORY OF THE CENSUS CLAUSE DOES NOT COMPEL A PARTICULAR METHODOLOGY IN CONDUCTING THE CENSUS.

The term "actual enumeration" cannot be torn from its

historical moorings, particularly in the deliberations of the Federal Convention. It is clear from that record that, in so far as the Founders conceived of a methodology or outcome for the census, they were reacting to a specific problem and wished to avoid its repetition. However, beyond this, the record does not support the Plaintiff's view that the Census Clause compels a particular census methodology.

The idea of a national population figure is almost as old as the United States itself. In Article IX of the first draft of the Articles of Confederation (submitted on July 12, 1776), the drafting committee called for all expenses of the United States to be apportioned to, and provided by, each Colony; it also required each Colony to submit a triennial account of its population. 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776-1787, 80 (Merrill Jensen, ed., 1976) (1 DHRC). Although that method of revenue, along with the census provision, dropped out of the final form of the Articles of Confederation, the subject reappeared not long after the end of the Revolution.[15]

In an attempt to secure an adequate revenue, the Confederation Congress submitted a proposed alteration to the Articles that would have apportioned the expenses of the Federal Government among the States according to their population. The proposed Article also directed that the "number [of inhabitants] shall be triennially taken and transmitted to the United States in Congress assembled, in

---

[15] Article IX of the final Articles of Confederation did require the States to provide troops "in proportion to the number of white inhabitants in such state," but did not provide a means for determining the number of inhabitants, 1 DHRC at 91, a defect New Jersey sought to remedy by amendment. *Id.* at 116.

such mode as they shall direct and appoint." *Id.* at 147-50. In considering this Amendment, the Confederation Congress attempted to determine the populations of the States. It found that it could not accurately do so because it lacked authoritative population figures. As the Congress lamented, only the small states of

> New Hampshire, Rhode Island, Connecticut and Maryland produced authentic documents of their numbers; in affixing the number of the other States the Committee were obliged to govern themselves by such information as they could obtain.

24 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 230-31 (Gaillard Hunt, ed., 1922).

The situation had not improved by the time of the Federal Convention. In attempting to arrive at the original apportionment of Representatives, the Framers and the Ratifiers found that there was *no* authentic evidence of the population of the United States to which they could turn. 1 DHRC 298. Thus, the Founders resorted to various figures of doubtful provenance and even more doubtful accuracy. In fact, it appears the Framers did not even have an uniform set of numbers for use among themselves.[16] Still other figures were in circulation during the ratification period. 18 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE

---

[16] *Compare* the population figures used by William Patterson (Delegate from New Jersey) with those used by David Brearley (Delegate from New Jersey), 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 572-73 (Patterson), 573-74 (Brearley) (Max Farrand, ed., 1937) (I Farrand) with those made public by Charles Cotesworth Pinckney at the South Carolina ratifying convention. 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 283 (Jonathan Elliot, ed. 2nd ed., 1907) (4 ELLIOT'S DEBATES).

CONSTITUTION, COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE 391 (note) (John P. Kaminski & Gaspare J. Saladino, eds., 1995). All of these were openly acknowledged by the Framers,[17], the Ratifiers,[18] and those who implemented the Constitution in the First Federal Congress,[19] to be inaccurate and without reasonable basis.

In short, the situation that the members of the founding generation faced was the need to make governmental decisions based on *wholly* speculative numbers. Circumstances required them to make those decisions. But they were, as Governeur Morris (Delegate from New York) noted during the Federal Convention, "little more than a guess." I Farrand 560. *See also id.* at 579 (Edmond Randolph (Delegate from Virginia) commented that ratio for the first allocation of Representatives was "a mere conjecture"); 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, 359 (Max Farrand, ed., 1937) (II Farrand) (James Madison (Delegate from Virginia) characterized the original number of Representatives "as conjectural"). What the Framers meant in providing for an "actual enumeration" was simply to avoid this "purely in speculation" situation (as the

---

[17] 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE [4] 509 (note) (John P. Kaminski & Gaspare J. Saladino, eds., 1986).

[18] 9 DHRC 921 (Remarks of George Nicholas in the Virginia Ratifying Convention); 4 ELLIOT'S DEBATES 31-32 (Remarks of Mr. Spaight in the North Carolina Ratifying Convention).

[19] 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 203 (Kenneth R. Bowling & Helen E. Veit, eds., 1988).

dictionaries noted above defined "actual"). The plan offered by the Census Bureau, based on large volumes of hard data and well-defined statistical techniques, is nothing like the situation the Framers wished to avoid.

Beyond this, the history of the Census Clause offers little in interpretive information that is relevant to this litigation. The Federal Convention first seriously addressed the need for a census after it settled the long, tortured debate on representation in Congress by adopting the "Connecticut Compromise." On July 10, 1787, Edmund Randolph introduced a motion,

> That in order to ascertain the alterations in the population & wealth of the several States the Legislature should be required to cause a census, and estimate to be taken within one year after its first meeting; and every Years thereafter -- and the Legislre. arrange the Representation accordingly.

I Farrand 570-71 (blank space in original). The Convention then moved to a substitute amendment from Hugh Williamson (Delegate from North Carolina),

> That in order to ascertain the alterations that may happen in the population and wealth of the several States a census shall be taken of the free inhabitants of each State, and three fifths of the inhabitants of other description on the first year after this form of Government shall have been adopted -- and afterwards on every term of years; and the Legislature shall alter or augment the representation accordingly.

Id. at 575 (blank space in original).

The original opposition to these motions came from Gouverneur Morris (Delegate from Pennsylvania) and Roger Sherman (Delegate from Connecticut). They defined the terms of the Census Clause debate. Their concern was not with a census or with how a census would be accomplished. Rather, both men objected to requiring the legislature to reapportion itself on a regular schedule. *Id.* at 571, 578. George Mason (Delegate from Virginia) responded to this. Like his colleagues, Mason did not address the issue of how to take the census, but the issue of how to the use the census. He believed that regular reapportionment, according to a fixed schedule, and according to a fixed ratio of representatives per person, was necessary. *Id.* at 578.[20] It was this divide, along with the related questions of the three-fifths clause, whether wealth should be part of the basis for Representation, and the relative representation among the States, that dominated the discussion on the matters that would eventually become the Census Clause. Indeed, technical matters directly related to the census, such as when the first one should be conducted, seems to have engendered virtually no discussion, *id.* at 588, before the Williamson substitute was defeated. *Id.*

The Convention revisited and settled this issue the next day, July 12, 1787. They first approached the matter by passing a motion by Gouverneur Morris, "that direct taxation ought to be proportioned to representation." *Id.* at 591-93.

---

[20] It is clear that Mason's call for a

> Revision from time to time according to some permanent & precise standard as essential to ye. fair representation required in the 1st. branch

referred only to the frequency of the census and the requirement for apportionment; it was not a standard on how to take the census. *See* I Farrand 582 (Remarks of Roger Sherman that he agreed with Mr. Mason "that the *periods* & the *rule* of revising the Representation ought to be fixt by the Constitution." (Emphasis in original)).

This reopened the debate on the three-fifths clause and the relation between wealth and representation. It also brought forth another motion by Edmund Randolph integrating the census with reapportionment.[21/] This was quickly superseded by a Motion from James Wilson (Delegate from Pennsylvania) that combined Gouverneur Morris's and Edmund Randolph's motions. [22/]

In considering these motions, the Convention again debated the three-fifths compromise, the frequency of the census (and thus reapportionment), and (briefly) the timing of the first census. The Convention finally adopted the following:

[21/]Mr. Randolph's motion was,

> And in order to ascertain the alteration in the representation which may be required from time to time by the changes in the relative circumstances of the States -- Resolved that a Census be taken within two years from the first meeting of the Legislature of the United States, and once within the term of every years afterwards of all the inhabitants of the United States in the manner, and according to the ratio recommended by Congress in their resolution of. and that the Legislature of the United States shall arrange the representation accordingly..

Id. at 589, 594 (blank space in original).

[22/]The motion of Mr. Wilson was,

> Provided always that representation ought to be proportioned according to direct Taxation , and in order to ascertain the alteration in the direct Taxation which may be required from time to time by the changes in the relative circumstances of the States -- Resolved that a Census be taken within two years from the first meeting of the Legislature of the United States in the manner and according to the ratio recommended by Congress in their resolution of April 18. 1783 -- and that the Legislature of the United States shall proportion the direct Taxation accordingly.

Id. at 590, 595.

> Provided always that representation ought to be proportioned according to direct Taxation and in order to ascertain the alteration in the direct Taxation which may be required from time to time by the changes in the relative circumstances of the States -- Resolved that a Census be taken within six years from the first meeting of the Legislature of the United States and once within the term of every Ten years afterwards of all the inhabitants of the United States in the manner and according to the ratio recommended by Congress in their resolution of April 18, 1783 -- and that the Legislature of the U.S. shall proportion the direct Taxation accordingly.

Id. at 591, 595-96.

That concluded the Federal Convention's substantive consideration of the census portion of the Constitution. On July 16, 1787, the Convention formally adopted the provision. II Farrand 14, 15. In late July, the matter was referred to the Committee on Detail along with all the other resolutions passed by the Convention up to that time. 1 DHRC 255, 258. It appeared in the first draft (August 6, 1787) of the Constitution prepared by the Committee on Detail as Article VII, Section 3. The draft clause read, in its entirety:

> The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within six years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the

said Legislature shall direct.

1 DHRC at 264-65. By the second (September 10, 1787) draft of the Committee on Detail, the Convention made only two minor changes, deleting the words "white and other" and changing the time for the first census from six to three years.[23] Thus, the provision in the September 10 draft of the Committee on Detail read:

> The proportions of direct taxation shall be regulated by the whole number of free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within three years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct.

1 DHRC at 278.

It was not until the September 12 report of the draft Constitution by the Committee on Style that the Census Clause as found in the Constitution took its final wording. *Id.* at 286. Unsurprisingly, there is no other substantive discussion of the meaning or methodology in the records of the Federal Convention, of the ratification debates, or of the

---

[23] These changes were made on August 20, 1787. The former provision was deleted because it was deemed superfluous, although James Madison recorded no further discussion of the matter. II Farrand 339, 350. Madison recorded no debate on the reason for the change of the latter provision. *Id.*

First Federal Congress which implemented the first census.[24]

The choice of the words "actual enumeration" in the Constitution was not meant to specify a particular procedure. That wording was a late choice of nomenclature by the Committee on Style. This Court has found, in accordance with the commands of the Federal Convention, that the

---

[24] Unsurprising because, as Alexander Hamilton, who was a delegate to the Federal Convention, explained to the New York Ratifying Convention, he, and the Federal Convention, were

> disposed not to dwell long on curious speculations, or pay much attention to modes and forms; but to adopt a system whose principles have been sanctioned by experience, adapt it to the real state of our country, and depend on probable reasonings for its operation and result.

2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 251 (Jonathan Elliot, ed., 2nd ed., 1907). What little discussion there is on the method of a census is so vague as to provide little, if any guidance. *See, e.g.*, 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES, 1789-1791, DEBATES IN THE HOUSE OF REPRESENTATIVES, SECOND SESSION: JANUARY-MARCH 1790, 14 (Helen E. Veit, et al., eds., 1994) (Remarks of Benjamin Goodhue: "the mode of enumerating the inhabitants of the several states, depended a good deal upon certain local regulations, and consequently required the circumstance of local information in those who were to bring forward the bill, this he apprehended would be best attained by forming the committee a member from each state.") *See also id.* at 61 ("Mr. Benson observed, that the purport of this enumeration was more particularly intended for the purpose of ascertaining the true representation"); *id.* at 136-37 (Remarks of Mr. Madison in support of a broad economic and social census, "If the object to be attained by this particular enumeration be as important in the judgment of this house, as it appears to my mind, they will not suffer a small defect in the plan, to defeat the whole. And I am very sensible, mr. speaker, that there will be more difficulty attendant on the taking the census, in the way required by the constitution, and which we are obliged to perform, than there will be in the additional trouble of making all the distinctions contemplated in the bill.").

Committee on Style's linguistic changes do not affect the meaning of what was agreed to during the Convention. *Nixon, supra,* 506 U.S. at 231; *Powell v. McCormack*, 395 U.S. 486, 538-39 (1969). It is the drafts of the Committee on Detail that explain what was meant by an "actual enumeration." That meaning is the simple direction that the "number shall . . . be taken in such manner as the said Legislature shall direct." There can be no clearer expression of the fact that the Constitution only commands that the Federal Government determine the number of inhabitants, and leaves virtually complete discretion to the Federal Government to determine how that number would be ascertained.[25] *See Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (the Census Clause gives the Federal Government "virtually unlimited discretion in conducting the decennial 'actual enumeration.'").

IV. THE EARLY IMPLEMENTATION OF THE CENSUS DOES NOT DEMONSTRATE A CONSTITUTIONAL TRADITION REQUIRING DIRECT CENSUS BUREAU CONTACT.

This Court frequently looks to the early implementation of constitutional provisions as an aide to determining the scope of those matters. The history of the

---

[25] Of course, this application of the Report of the Committee on Detail is completely different than the use disapproved in *Nixon*. In that case, Judge Nixon wanted to use the work of the Committee on Detail to read out of the Constitution words and concepts that appear in the final text. In contrast, the present use of the Committee on Detail's draft is in full harmony with this Court's precedent: that the Report of the Committee on Detail explains the words of the Constitution where there is a question as to the meaning of the words chosen by Committee on Style. As the Amicus Curiæ demonstrated, the words "actual enumeration" do not in themselves lead to one particular and specific meaning.

early censuses demonstrate that there is a tradition of using unadjusted "headcounts" that rises to constitutional importance. However, a close examination of the statutory story of the census demonstrates that from the beginning Congress was sensitive to the need to, and difficulty in, counting all Americans. The record also shows that, like an estimation, Congress required that certain persons who could not be contacted by an enumerator must be counted. This history also discloses that Congress allowed adjustments to the census lists in an attempt to insure inclusiveness.

The first Census Act, closely following the language and the meaning of the Committee on Detail, simply called for the United States marshals "to cause the number of inhabitants within their respective districts to be taken." Act of March 1, 1790, Ch. 2, § 1, 1 Stat. 101, 101 (1790) (First Census Act). The Act did not specify any methodology for the marshals to follow in gathering the number of inhabitants.[26] In addition, in the first, and subsequent five, censuses, persons were not listed individually, by family, or by any other means.[27] Rather, the number of types of persons per household (generally but not invariably collected by family name) was simply counted. Id. § 1, 1 Stat. at 102. For example, Alexander Hamilton's household contained had two free white male of sixteen years and upward, one free white male under sixteen years, and one free white female. 7 BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE AND

---

[26] Later Congress stated that the census should be taken, "by an actual inquiry at every dwelling-house, or of the head of every family within each district, and not otherwise." Act of March 26, 1810, Ch. 17, § 1, 2 Stat. 564, 565 (1810) (Third Census Act).

[27] Only with the 1850 Census were people listed individually. Act of May 23, 1850, Ch. 11, §10, 9 Stat. 428, 430 (1850) (Seventh Census Act).

LABOR, HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790, 134 (1908) (FIRST CENSUS). There was no break-out or listing of the individuals counted; persons were simply a tallied number by category. Further, even with such broad recording, only aggregate figures were forwarded to the President for use as part of the final census information. First Census Act, § 3, 1 Stat. at 102. Thus, by the time the figures reached his Cabinet colleague, Secretary of State Thomas Jefferson, who was responsible for the First Census and who simply reprinted the information as he received it from the marshals, MARGO ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 13 (1988), the Hamilton household was simply a part of 8,328 free white males over sixteen years, 5,797 free white males under sixteen years, and 14,963 free white females inhabiting New York City. Thomas Jefferson, Return of the Whole Number of Persons within the Several Districts of the United States 37 (1791), *reprinted in* 9 NATIONAL STATE PAPERS OF THE UNITED STATES, 1789-1817, at 2, 36 (Eileen Carzo ed., 1985).

The First Census Act gave the marshals ample discretion in the method by which they could acquire and report such broad figures. And the marshals apparently took full advantage of this. For example, the marshal in Massachusetts simply lumped together sixty-five of the garrison in the islands of Boston Harbor. 4 FIRST CENSUS 195. Similarly, the marshal in Maryland simply described over 450 people in unincorporated Baltimore County under the headings of "other free people" (probably mainly free Blacks and Indians). 9 FIRST CENSUS 26-35. Clearly, whatever else was transpiring, the First Census did not consist of the kind of head count the Appellees apparently envision.

The reason for this broad and general accounting of people stems in part from the fact that the First Census Act

makes evident that the marshals were not required to contact or have a return from every person they counted. Section 6 of the First Census Act, 1 Stat. at 103, required every person over age sixteen to "give a true account, to the best of his or her knowledge, of all and every person" in a family. More importantly, Section 5 of the First Census Act, *id.*, required that any person "absent at the time of the enumeration" should be counted "as belonging to that place in which he usually resides in the United States."[28] These sections demonstrate that Congress realized that it was not possible for an enumerator to individually contact every person so that they could be counted. If enumerators were limited to those whom they could contact, it would be impossible to count people who were "absent at the time of the enumeration." Yet the statute demonstrates that Congress clearly wanted those persons who could not be contacted to be counted. Other methods must have been, and were expected to be, employed to insure the most complete census number.

Throughout the remainder of the Nineteenth Century, Congress continued to provide for a means of counting those who could not be contacted and to insure that all segments of the population were included in the census count. For example, in the first major revision of the census law, in 1850, Congress instructed the marshals and their assistants to gather information by "visiting every dwelling-house and . . each family in the subdivision assigned to him." Seventh Census Act, § 10, 9 Stat. at 430. However, if there was no one who could provide the necessary census information, the

---

[28] This provision was repeated in census acts for the next half century. Act of February 28, 1800, Ch. 12, § 5, 2 Stat.11, 13 (1800); Third Census Act, §5. 2 Stat. at 567; Act of March 13, 1820, Ch. 23, § 5, 3 Stat. 548, 552 (1820); Act of March 23, 1830, Ch. 40, § 5, 4 Stat. 383, 386 (1830); Act of March 3, 1839, Ch. 80, § 5, 5 Stat. 331, 335 (1839).

census-takers were to obtain that information from an agent of the person(s). *Id.* Thus, uncontacted persons were counted in the census.[29]

This standard was broadened further in the next revision of the law, for the tenth census, in 1880, and the ones that followed. These amendments also make three interesting comparisons with the Census Bureau plan under consideration in this case.

First, under the 1880 census methodology, the census-takers were to contact every abode, family, and individual. Act of March 3, 1879, ch. 195, §8, 20 Stat. 473, 475 (1879). Under its present plan, in 2000 the Census Bureau will likewise try to contact every person. However, just as the Census Bureau does not expect to be able to reach all persons in 2000, so Congress did not expect this would be possible in 1880. Thus, in 1880, the law expanded the 1850 technique and allowed the census-takers to gather "the required information, as nearly as may be practicable, from the family or families or person or persons living nearest to such place of abode." *Id.* The sampling techniques proposed by the Census Bureau for the 2000 enumeration seem to fall into this tradition. In essence, it will take required information from those persons situated closest to those who were not reached and use them as a stand-in so that the uncontacted still may be counted. While this may not provide a listing for every individual as was done in the 1880 census, this has no constitutional consequence. As described above, no individual information was gathered, and only aggregate

---

[29]This procedure apparently supplanted the prior provision that absent persons would be counted in their usual residence. With an agent of the person to provide the required census information, the prior system became superfluous.

information was used, for the first sixty years of the census.

Second, there is another interesting comparison between the concerns of Congress as reflected in its plan for the 1880 census and the concerns the Census Bureau in its plan for the 2000 Census. The Census Bureau is worried that significant portions of the population in certain areas will be missed unless its plan is implemented. The Forty-Fifth Congress had the same worry. It commanded each supervisor of census to make sure that no "town or village or integral portion of the [census] district has been omitted from enumeration." *Id.*, §5, 20 Stat. at 474. Using modern techniques, the Census Bureau seeks to fulfill the same goal.

Third, Congress was concerned with obtaining the best, most accurate account of the number and distribution of the population. Accordingly, it allowed the supervisors of census to "correct[] his enumeration by striking out or adding the designation of persons improperly enumerated or omitted . . . [and] correct, on such reliable information as he may obtain, all omissions and mistakes in such enumeration. . . ." Act of April 20, 1880, ch. 57, § 3, 21 Stat. 75, 75-76 (1880). Likewise, the Census Bureau plan for the 2000 enumeration would allow the Bureau to correct improperly omitted persons in the count by using reliable population information.

As the foregoing demonstrates, Congress always has been concerned with the very same issues that the Census Bureau seeks to address in its plan for the 2000 census. Congress sought to address those concerns within the limits of the techniques and technologies reasonably available to it at the time. The Census Bureau's 2000 plan is an advance within the constitutional tradition of using more than just a list of directly contacted names to determine the number of

inhabitants of the United States.

In addition, there is no historical evidence or pattern indicating that the particular proposed census methodology, statistical sampling estimation techniques, was expressly prohibited by the Framers. To the extent estimation was used during the Colonial and Confederation periods to determine population, there is no evidence that the Framers sought to repudiate its use in the Federal census. In what is apparently the only statement on this subject in the whole constitutional debate, Caleb Strong, a delegate to the Federal Convention, told the Massachusetts Ratifying Convention that the "mode of census [in the Constitution] is not new." 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, 260 (Max Farrand, ed., 1937). Thus, to the extent the Framers used estimations, they are within their constitutional census conception.

In fact, not only did the Framers not mean to freeze the "headcount" method into the Constitution, they repeatedly expressed dissatisfaction with it and its inaccuracy. For example, George Washington wrote that the real numbers of inhabitants in the United States in 1790 was greater than the number found in the First Census because of the difficulties inherent in the methodology that was employed.[30] It is difficult to believe that the Framers set in constitutional

[30] Letter from George Washington to Gouveneur Morris (July 28, 1791), *in* 31 THE WRITINGS OF GEORGE WASHINGTON at 326, 329 (John C. Fitzpatrick ed., 1931). Other of the Founding Fathers expressed the same sentiment. *See, e.g.*, Letter from James Madison to Edward Carrington (Mar. 14, 1790), *in* 13 THE PAPERS OF JAMES MADISON at 103, 105 (Charles Hobson & Robert Rutland, eds., 1981); Letter from Thomas Jefferson to David Humphreys (Aug. 23, 1791), *in* 22 THE PAPERS OF THOMAS JEFFERSON at 61, 62 (Charles Cullen, ed., 1986).

concrete a methodology they so thoroughly criticized.[31]

Over the course of the next 200 years, the science of statistics improved dramatically, but the Government's ability did not keep pace with those developments. When the New Dealers arrived, they found a moribund Census Bureau. It had virtually no professionally trained statisticians and "bureau personnel were completely ignorant of the developments in probability theory that had revolutionized the science of statistics since the turn of the century." THE AMERICAN CENSUS at 173-75. As important, "statisticians had not yet developed either the statistical theory or the practical methodology necessary to evaluate the accuracy of the [statistical] sample." *Id.* at 177. Such information was first established in the 1930s. The first tentative steps toward census statistical sampling were taken in the 1940 census and have been refined ever since. *Id.* at 180-87. After the results of the 1950 census, the Bureau determined that "from the perspective of the total census, more accurate results could probably be achieved in a carefully taken sample than from a complete census." *Id.* at 201. It was also in the 1950 census that the Bureau first started measuring the undercount. *Id.* at 202. By 1987, the Bureau determined that statistical

[31] However, even if there was any discontent with the methods available to the Framers in the Seventeenth and Eighteenth Centuries, these early estimates bear little relation to the sophisticated statistical techniques proposed by the Census Bureau. Indeed, at the time of the Founding, the field was so new that the words "statistics" and "statistical" were not even members of the English language. DANIEL BOORSTIN, THE AMERICANS, THE DEMOCRATIC EXPERIENCE 167 (1973). This is not to say that because the field was so new, in many ways unknown, and lacking in terminology, that the Founding Fathers would reject statistics or that they cannot be encompassed inside the scope of the Census Clause. As demonstrated above, mathematical action was clearly within the Framers' understanding of the words and concepts of an enumeration.

sampling was at the point that it could provide highly accurate aggregate and distributive information. *Wisconsin*, *supra*, 517 U.S. at 10-11 (although the Secretary of Commerce decided not to use statistical techniques in the 1990 census).

This history demonstrates, a continuing effort to get the best, most complete census count consistent with the techniques and technologies of the day. It is also clear that there was no government policy against the use of statistical sampling estimation techniques in our history. Nor was there an unswerving fidelity to a "headcount" method. Rather, for most of its history, the Federal Government simply lacked the capacity, the methods, and the ability to perform such acts. There is no constitutional significance in the fact that the Federal Government did not do something it could not do.

V. CONCLUSION

There is little or no evidence that the Census Clause was meant to either prescribe or proscribe any particular methodology so long as its basic objectives were accomplished. The Amicus Curiæ request that the judgments of the District Courts be reversed.

Respectfully Submitted,

DONALD DINAN
O'Connor & Hannan
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-1400
Counsel for the Amicus Curiæ, The District of Columbia State Democratic Committee

October 20, 1998